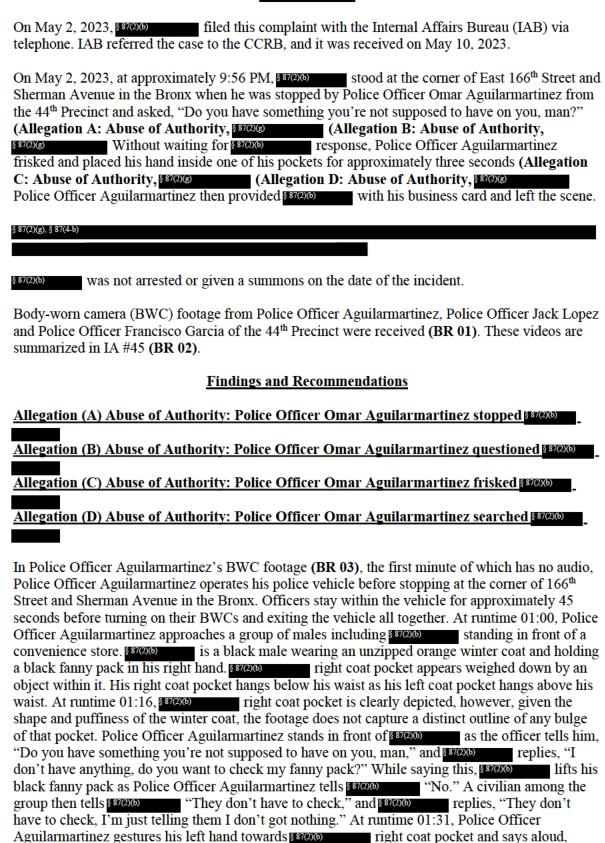
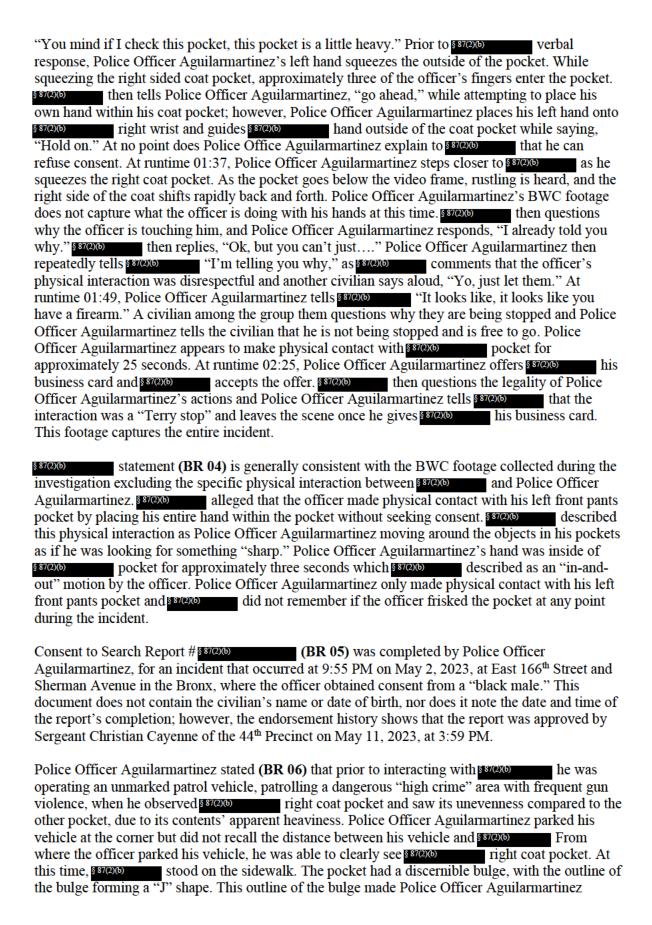
## CCRB INVESTIGATIVE RECOMMENDATION

Investigator:		Team:	CCRB Case #:		Force		Discourt.	U.S.
Kelly Guillon		Squad #17	202304127	☑	Abuse		O.L.	☐ Injury
Incident Date(s)		Location of Incident:			18 N	Mo. SO	OL	Precinct:
Tuesday, 05/02/2023 9:56 PM		East 166th Street and S	herman Avenue		11/	/2/202	4	44
Date/Time CV Reported		CV Reported At:	How CV Reported:		Date/Tim	ne Rece	eived at CCI	RB
Tue, 05/02/2023 10:07 PM		IAB	Phone		Wed, 05/	10/202	23 2:51 PM	[
Complainant/Victim	Туре	Home Addre	ss					
Subject Officer(s)	Shield	TaxID	Command					
1. PO Omar Aguilarmartinez	18025	963837	044 PCT					
Witness Officer(s)	Shield N	o Tax No	Cmd Name					
1. PO Jack Lopez	25935	967170	044 PCT					
2. PO Francisco Garcia	02866	952762	044 PCT					
Officer(s)	Allegatio	on			Inv	estiga	ntor Recon	nmendation
A . PO Omar Aguilarmartinez	Abuse: Police Officer Omar Aguilarmartinez stopped							
B . PO Omar Aguilarmartinez	Abuse: Police Officer Omar Aguilarmartinez questioned							
C . PO Omar Aguilarmartinez	Abuse: Police Officer Omar Aguilarmartinez frisked							
D . PO Omar Aguilarmartinez	Abuse: Police Officer Omar Aguilarmartinez searched							
§ 87(2)(g), § 87(4-b)				L				
§ 87(2)(g), § 87(4-b)								

## Case Summary





believe that \$87(2)(6) had concealed a "revolver" within his coat pocket. The officer described the revolver as being placed "upside down," with the barrel of the gun resting toward the zipper of the coat as it faced upward towards \$87(2)(6) chest and the handle of the gun rested horizontally on the base of the coat pocket. During Police Officer Aguilarmartinez's observation, made eye contact with the officer and then immediately averted his gaze and nervously pace back and forth. In combination with \$87(2)(b) "suspicious" gestures and the bulge, Police Officer Aguilarmartinez had reasonable suspicion that \$87(2)(6) was concealing a firearm. Police Officer Aguilarmartinez did not recall having a conversation with his partners prior to exiting his police vehicle and believed he was the officer who made the decision to exit the police vehicle. Police Officer Aguilarmartinez observed pocket within the patrol vehicle for approximately one minute. Upon exiting the vehicle, Police Officer Aguilarmartinez asked "Do you have anything you aren't supposed to have?" due to his belief that sayon had a firearm in his coat pocket. \$87(2)(6) was not free to leave at this point. Police Officer Aguilarmartinez stated once he stood in front of steps the outline of the bulge became clearer and was still indicative of a firearm within the pocket. § \$7(2)(6) ■ told Police Officer Aguilarmartinez that he did not have anything on him and questioned if the officer would like to check his fanny pack. Police Officer Aguilarmartinez denied the request and instead asked if he could "check" his coat pocket instead. At this time, Police Officer Aguilarmartinez was asking \$5000 for consent to frisk the exterior of the coat pocket. Police Officer Aguilarmartinez explained that he did not need store consent to frisk the outside of the coat pocket because he had a reasonable suspicion that there was a firearm within the pocket, but he chose to ask \$57000 to feel violated by the officer's actions. Police Officer Aguilarmartinez told \$87(2)(6) that he could decline if he wished told the officer, "Go ahead." Upon being given verbal consent, Police Officer Aguilarmartinez frisked § 87(2)(b) coat pocket with both of his hands and determined that the objects within the pocket were a phone and a portable phone charger connected by a wire. Police Officer Aguilarmartinez denied placing his hand within the coat pocket at any point during the incident. Upon being shown his own BWC footage of the incident, Police Officer Aguilarmartinez explained that the footage did not clearly capture what he recalled seeing in regard to the shape of the bulge given the low video quality. Upon an initial review of the footage, Police Officer Aguilarmartinez stated he made physical contact with \$87(2)(6) coat pocket prior to being given verbal consent for safety reasons because was motioning towards his coat pocket, which he believed contained a gun. Police Officer Aguilarmartinez took a protective action by placing his hand on success wrist and guiding his hand away from the pocket. Upon being shown the footage a second time, Police Officer Aguilarmartinez acknowledged that he made physical contact with \$87(2)(6) pocket prior to \$87(2)(6) motioning to his pocket and believed he did this because he already had consent from second to frisk his pocket when he initially proffered consent to frisk his fanny pack. Police Officer Aguilarmartinez believed because proffered consent to frisk his fanny pack it gave the officer consent to also frisk his pocket. Police Officer Aguilarmartinez denied placing his fingers within the coat pocket during his frisk and did not remember how long he frisked the pocket for.

Patrol Guide Procedure 212-11 (BR 07) states that founded suspicion of criminal activity arises when there is some present indication of criminality based on observable conduct and with founded suspicion an officer is permitted to ask the civilian pointed or accusatory questions. Reasonable suspicion exists when the information known to the member of the service would make an ordinarily prudent and cautious police officer believe that a crime has been committed. A stop is any encounter between a civilian and uniformed member of service in which a reasonable person would not feel free to disregard the officer and walk away. A stop may be conducted only when a police officer has an individualized reasonable suspicion that the person stopped has committed a felony or Penal Law misdemeanor. A "frisk" is classified as a careful and limited run of the hands

over the outside of a person's clothing to feel for deadly weapons or any instruments, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in a public place and a search occurs when an officer places their hands inside a pocket or other interior portion of a person's clothing or personal property. During a stop an officer may request consent to search; however, the consent must be voluntarily given. If said person does not consent to a search, the search cannot be conducted unless a previous frisk reveals an object that the officer reasonably suspects is a weapon or dangerous instrument.

New York City Administrative Code 14-173 (BR 08) establishes that, when seeking consent to search a person, officers are to articulate, using plain and simple language delivered in a non-threatening manner, that the person who is the subject of the search is being asked to voluntarily, knowingly, and intelligently consent to such search, and explaining that such search will not be conducted if the person refuses to provide consent to such search. An officer must refrain from conducting such search where such consent has not been obtained. Officers are to secure the consent without threats or promises of any kind being made. This guidance does not apply when an officer reasonably expects that he or she or any other person is in danger of physical injury or that there is an imminent risk of damage to property, or to forestall the imminent escape of a suspect or the imminent potential destruction of evidence.

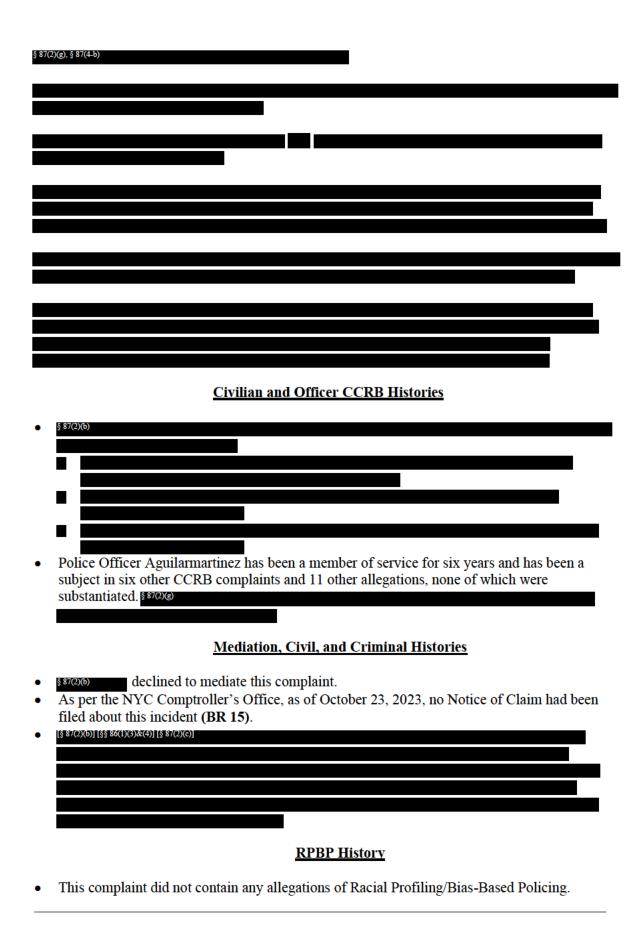
An officer may only ask pointed and accusatory questions of a civilian when the officer has founded suspicion of criminality and innocuous behavior alone will not generate a founded or reasonable suspicion that a crime is at hand. For a stop of an individual to be justified, an officer must have reasonable suspicion that the individual is committing, has committed, or is about to commit a crime. A frisk of an individual must be based on a reasonable suspicion that a particular person has committed, is committing or is about to commit a crime and that the officer is in danger by virtue that the individual is armed, and innocuous behavior alone is not adequate basis for reasonable suspicion. Unlike a waistband bulge, telltale of a weapon, a pocket bulge could be caused by any number of innocuous objects. "Police officers may not seize an individual, either physically or constructively, without some articulable justification." If the frisk reveals an object that is reasonably believed to be a weapon, the officer is permitted to enter clothing and remove it. (People v. DeBour, 40 N.Y.2d 210 (1976) (BR 10))

"Undefinable pocket bulges are not considered to be sufficient predicate for a frisk or search for a revolver, although defined bulges in the outline or configuration of a gun do warrant a frisk." (People v. Taveras, 155 A.D.2d 131 (1990) (BR 11))

In <u>People v. Black</u>, 972 N.Y.S.2d 145 (2013) (**BR 09**), officers in the Bronx heard gunshots in close proximity to their location and went to investigate the scene. Once arriving at the location where the gunshots were heard, they saw a group of civilians walking and questioned if they heard any gunfire. At this point the officers stated that the group seemed confused and surprised by the officers as they accelerated their walking speed and one of them began adjusting the right side of his jacket and his waistband as if the individual was grasping an object on the side of his jacket, with an observable bulge of a "heavy object of substantial size" at his waist. The group then ran as the officers chased after them. The court determined once the officers heard the gunfire, they had an objective creditable reason to question the group about it. However, there was no evidence that could link the defendants to the gunfire heard at this time. Though the officers testified that a member of the group had a heavy bulge, the officers were unable to provide a detailed description of the bulge such as its shape. The court determined that "without any nexus between the shots fired and the Defendant, the surprised look on the face of the Defendant and the two other individuals does not provide a connection sufficient to raise the level of intrusion. The two events are too attenuated, one from the other. Therefore, the Officer's inquiry does not begin with a founded

suspicion of criminal activity on the part of the Defendant but begins with the lesser standard of objective credible reason." Given that the officers did not have reasonable suspicion to believe that the group is connected to a crime that has been, is being or is about to be committed and given that they never testified to any description of the bulge other than its heaviness, the court determined that the officers had no facts to support their belief that the object was a weapon and did not have a reasonable basis for believing that the bulge was a weapon. Therefore, the subsequent stop and police activity was not reasonable nor justified as officers only ever had an objective and credible reason to approach the Defendant before the Defendant fled the scene.

In Police Officer Aguilarmartinez's account, he stated that he saw a "J-shape[d]" bulge outlined within coat pocket indicative of an "upside down" "revolver," leading to his reasonable suspicion that was armed and dangerous. Upon exiting the police vehicle, the shape of the bulge became clearer to the officer, which led him to question and frisk the pocket. However, despite the BWC footage depicting a weighted bulge in right coat pocket, the footage clearly depicts the pocket and does not capture a discernible outline given the shape and material of the winter coat.
The footage capture does show Police Officer Aguilarmartinez's fingers within stating any consent for such a search.
§ 87(2)(g)
§ 87(2)(g), § 87(4-b)
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Squad No.:					
Investigator:	Kelly Guillon	Investigator Kelly Guillon	November 2 <sup>nd</sup> , 2023		
	Signature	Print Title & Name	Date		
Squad Leader:	Benjamin Shelton	AIM Benjamin Shelton	11/03/2023		
	Signature	Print Title & Name	Date		
Reviewer:					
	Signature	Print Title & Name	Date		